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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-684

The State of California,

Petitioner,

vs.

Billy Greenwood and Dyanne Van Houten,

Respondents.

On Writ of Certiorari to the
Court of Appeal of California
Fourth Appellate District, Division Three

RESPONDENT'S BRIEF IN OPPOSITION

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Dyanne Van Houten

QUESTIONS PRESENTED

1.

Did the People of the State of California preserve the issue of respondent Dyanne Van Houten's standing to challenge the search of Billy Greenwood's trash?

2.

Is this writ application distinguishable from that presently before the Court in California v. Rooney?

3.

Are there unresolved issues of fact and law which neither the trial court nor the court of appeal were required to address once each determined trash searches were violative of the Fourth amendment?

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Respondent, Dyanne Van Houten, respectfully requests this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Court of Appeal of California, Fourth District, Division Three in this matter, decided June 23, 1986. The opinion is reported at 182 Cal. App. 3d 729.

STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case. (See Petition for Writ of Certiorari, pp. 2-3.)

STATEMENT OF FACTS[1]

Jenny Stracner was a narcotics investigator for the city of Laguna Beach. (C.T. 129.) Based upon information received from an anonymous informant, she began a practice in February to monitor the trash at Billy Greenwood's residence. (C.T. 113.) She would ask the trash collectors to pick up the trash at Greenwood's residence, keep it separate from all other trash in the truck, and bring it down the street where she would wait. (C.T. 92.)

The trash was brought in a segregated area of the trash truck in a dark trash bag tied at the top. (C.T. 102.) There was no evidence any contraband could be seen without opening the bag. Inside the bags officer Stracner found items she believed indicated drug use; bindles with residue, straws with residue and baggies with residue. (C.T. 91.)

Based upon her findings, she sought and obtained a search warrant for 1575 Fayette, Laguna Beach. (See exhibit one below.) On April 6, 1984, she and other police officers executed the search warrant on the house. (C.T. 130.)

[1] The facts are those solely relevant to the proceedings against Dyanne Van Houten. Respondent adopts the facts set forth in the opinion of the court of appeal at 182 Cal. App. 3d 729.

During the search of respondent Greenwood's house, officer Richard Seapin went upstairs to search additional rooms. (C.T. 160.) On the floor he observed a purse. Officer Seapin opened the purse and looked inside seeing a sheet of magazine, crumpled up. (C.T. 161.) Seapin removed the paper from the purse, opened it and found white powder which he turned over to officer Stracner. (C.T. 161-162.)

The purse contained an identification card with Dyanne Van Houten's name and picture. (C.T. 163.) When officer Jimenez went downstairs with the purse and asked whose it was, Dyanne Van Houten claimed it. (C.T. 175.) Van Houten was then arrested. (C.T. 70.) The white powder was determined to be cocaine. (C.T. 61.)

REASONS WHY THE PETITION SHOULD BE DENIED

1.

THE PEOPLE FAILED TO PRESERVE THE QUESTION OF RESPONDENT DYANNE VAN HOUTEN'S STANDING TO CHALLENGE THE SEARCH OF BILLY GREENWOOD'S TRASH.

In their Petition to this Court, the People have raised the simple and unencumbered question whether trash placed at curbside is protected under the Fourth Amendment. However, in the court of appeal the People further asserted Dyanne Van Houten lacked standing (United States v. Salvucci (1980) 448 U.S. 83) to challenge the warrant served on Greenwood's residence since she appeared to be "but a guest in the residence" at the time of the search. However, based upon the People's failure to raise the issue before both the magistrate and trial court, the court of appeal determined the,

> "failure to challenge her standing [ ] constitute[d] a waiver of the issue here. (Steagald v. United States (1981) 451 U.S. 204, 208-209.)" (People v. Greenwood, (1986) 182 Cal. App. 3d 729, 735.)

Thus, were the Court to grant review and endeavor to decide the issue as presented in the Petition, the People have burdened that decision with the procedural error of failing to object to the hearing on the basis of the proposed lack of standing. In short, for the Court to reverse the decision of the court of appeal, the Court must itself determine an issue of constitutional proportions (see gen. Steagald v. United States, supra) never raised in the Petition for Writ of Certiorari and never raised before a trier of fact in the trial courts.

Further, should the Court reverse the decision of the court of appeal, respondent Van Houten must still be afforded an opportunity to challenge the search of Greenwood's residence and the search of her purse conducted pursuant to the warrant. Both would be challenged on the basis that the search warrant lacked probable cause even with the evidence

collected from Greenwood's trash and the search of respondent's purse pursuant to the warrant exceeded the scope of the warrant issued by the magistrate. Neither issue was explored below solely due to the clear California precedent mandating suppression of warrantless trash searches.

Based upon the necessity of following People v. Krivda (1971) 5 Cal. 3d 357 and People v. Krivda (1973) 8 Cal. 3d 623 (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450), neither the magistrate nor the trial court were required to resolve whether independent of any privacy interest in the trash Dyanne Van Houten's Fourth Amendment protection was violated by the search of her purse. As the court of appeal determined,

> "[e]ach warrant [was] dependent on the information from the two trash searches. In other words, of the fruits of the trash searches are excised from the warrant affidavits, those affidavits lack[ed] probable cause to search . . . ." (People v. Greenwood, supra, at p. 733.)

Similarly, based upon Krivda, never were either respondents Greenwood or Van Houten required to establish, as a matter of fact rather than law, that they had a reasonable expectation of privacy in the trash placed at curbside. (Katz v. United States (1967) 389 U.S. 347.) All arguments made by the People and respondents were predicated on the decision of the California Supreme Court in Krivda that as a matter of law trash was protected regardless of the objective or subjective reasonableness of the owner. The result is that a decision by this Court reversing the decision of the court of appeal will not result in a final decision on whether the search of respondent Van Houten's purse was proper.

PEOPLE v. ROONEY IS DISTINGUISHABLE

People v. Rooney (1985) 175 Cal. App. 3d 634 [cert. granted California v. Rooney (85-1835)] represents a factual setting far different than that presented here. Rooney was a confirmatory search of a communal trash bin where the police lacked probable cause to search the bin but were possessed with sufficient probable cause (id., at pp. 646-647) to seek a warrant prior to the search of Rooney's house. While the Court may well have granted certiorari to resolve the efficacy of warrantless trash searches in its broadest sense, the facts in Rooney do not permit the Court to resolve whether probable cause, or some lesser standard, must exist for a warrantless search of trash bins. The court of appeal specifically resolved the search warrant in the People's favor and reversed the dismissal below. (Id., at p. 649.)

When the police searched Billy Greenwood's trash, they did so absent any legally sufficient quantum of cause. Without corroboration (Illinois v. Gates (1983) 462 U.S. 213), the police here searched Greenwood's trash solely upon an anonymous tip and nothing more. Similarly, unlike Rooney, the search warrant obtained for Greenwood's residence was based solely upon the trash searches conducted without probable cause and were held invalid by the court of appeal.

The greatest difficulty in resolving the reasonableness of trash searches is the ultimate decision whether trash left at curbside of a residence is abandoned property or whether, as the court of appeal opined in Rooney, should trash left in such condition receive a,

> "secondary level of protection applicable to automobiles in determining Fourth Amendment search and seizure issues[?]" (People v. Rooney, supra, at p. 645.)

Since California determined in Krivda that as a matter of law trash left at curbside was enveloped in the same protections afforded the home, the facts underlying any conclusion to the

contrary were never developed below and thus the Court is without a factual background over which a judgment on the lawfulness of this search may be gauged.

In sum, Rooney and this proceeding share only the nature of the container which police chose to attack in building a case. Beyond the garbage pail, little is in common.

THERE ARE UNRESOLVED ISSUES OF FACT AND LAW WHICH NEITHER THE TRIAL COURT NOR THE COURT OF APPEAL WERE REQUIRED TO ADDRESS ONCE EACH DETERMINED TRASH SEARCHES WERE PER SE VIOLATIVE OF THE FOURTH AMENDMENT.

Petitioner seeks a decision that trash left at curbside is not subject to the protections of the Fourth Amendment. In support of that position Petitioner notes that most courts which have confronted the issue have reached that conclusion. Presumably Petitioner will argue that trash, no matter where left, is abandoned property.

However, for this Court to make such a determination the record should not be so narrowly confined as to leave the Court no basis upon which to judge the appropriateness of that conclusion. The state of the record before the Court in this proceeding is bereft of any facts other than those which arise from police conduct; a search of trash leading to a search warrant for a residence.

No where was it established whether respondents' harbored a subjective expectation of privacy. This is the state of the record notwithstanding evidence the trash was in an opaque, closed trash bag which required the police to either tear through or untie to gain entry and observe its contents. No magistrate or trial judge, sitting as a trier of fact, has ever determined the veracity of a claim of privacy nor has a trier of fact, based upon the facts of this case, determined if an expectation of privacy was reasonable.

If the Court is to engage in a policy debate pitting a citizen's right to privacy[2] against the State's right to prosecute criminal activity, that debate should begin in the lower courts. Here there has been neither debate nor

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[2] Since this brief is not addressed to the merits it may be inappropriate to raise the question of to what degree the State should be permitted to on the one hand demand citizens give their garbage to the State, primarily in the form of local ordinances restricting the transportation, possession and storage of trash, and at the same time declare open season on surveillance of its contents for public examination and criminal prosecution.

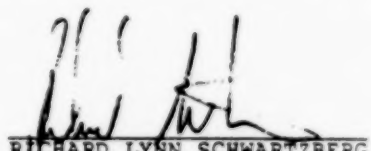
reflection. It was not until Petitioner reached the California Supreme Court that such debate began and it is inappropriate to take that debate up now. Whether the Court should hold trash left at curbside is abandoned, whether it is to be treated akin to possessions left in an automobile upon the highway, or whether it is to be afforded the same protections citizens enjoy in their homes and curtilage, this case is not ripe to make those determinations.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

DATED: January 20, 1987

Respectfully submitted,



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Attorney for Respondent
Dyanne Van Houten

CALIFORNIA,)
)
v.) DECLARATION OF SERVICE
)
BILLY GREENWOOD et.al.)
)
)
)
)

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

Richard Schwartzberg declares that he is a citizen of the United States, a resident of Orange County, over the age of eighteen years, not a party to the above-entitled action and has a business address at 401 Civic Center Drive West, Santa Ana, California 92701.

That on the 20th day of January, 1987, I served a copy of the BRIEF IN OPPOSITION in the above-entitled action by depositing a copy thereof in a sealed envelop, postage thereon fully paid, in the United States mail at Santa Ana, California. Said envelopes were addressed as follows:

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Further, that on the same date I personally served a copy of the above-entitled action by delivering by hand and leaving with the person hereinafter named a copy thereof:

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